APPENDIX "A" - Decision on Hearing - See Petition page 1a-30a

APPENDIX "B" - Appellate Division Opinion See Petition page 31a-34a

APPENDIX "C" - New York State Court of Appeals denial - See Petition page 35a

APPENDIX "D" - People v. Rogers, 48 N.Y.2d 167 (1979) - (attached)

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v HERBERT L. ROGERS, Appellant.

Argued September 13, 1979; decided October 23, 1979

SUMMARY

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 1, 1978, which affirmed judgments of the Nassau County Court (EDWARD A. BAKER, J.), convicting defendant of robbery in the first degree upon a jury verdict and of burglary in the third degree upon his plea of guilty.

Defendant was arrested as a suspect in a robbery. *Miranda* warnings were administered at the time of arrest and again at police headquarters. Defendant informed the police that he had an attorney but that he was willing to speak in the absence of the attorney. After a two-hour period of interrogation in which defendant denied complicity in the crime, the police received a communication from his attorney instructing them to cease further questioning. Thereafter, the police asked no further questions about the robbery but, under a purported waiver of defendant's rights, continued to question concerning unrelated activities in which he had not participated. These queries continued for approximately four hours after the communication from his attorney. During this entire period, defendant was manacled. After inquiries ceased, the police completed the paper work necessary to process defendant and no further information was sought. Defendant then uttered an inculpatory statement which was overheard by one of the detectives who had been questioning him. His motion to suppress the statement was denied on the ground that the assertion was spontaneously volunteered.

The Court of Appeals reversed the order of the Appellate Division and remitted the case for a new trial, holding, in an opinion by Chief Judge COOKE, that once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel, and that the inculpatory statement was not spontaneously volunteered.

People v Rogers, 63 AD2d 867, reversed.

HEADNOTES

Crimes — Confession — Custodial Interrogation

1. Once an attorney has entered a proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel, and the police may not seek a waiver of the right to counsel except in the presence of counsel; accordingly, an inculpatory statement made by a defendant in custody after the police had received a communication from defendant's attorney instructing them to cease further questioning and after they continued to question the defendant concerning unrelated activities in which he had not participated, was improperly admitted at defendant's trial, and a new trial is required. The inculpatory statement was not admissible as a spontaneously volunteered statement, in view of the approximately six hours of interrogation during which time the defendant, a youth of limited education, was manacled to furniture.

Crimes — Instructions

2. It is unnecessary and improper to qualify a charge to the jury that no inferences are to be drawn from a defendant's failure to testify with words indicating that it is given at defendant's request.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

CLS, Criminal Procedure Law § 60.45

29 Am Jur 2d, Evidence § 587

5 Am Jur Trials 461, Excluding Illegally Obtained Evidence

ANNOTATION REFERENCES

Constitutional aspects of procedure for determining voluntariness of pretrial confession. 1 ALR3d 1251.

Admissibility of pretrial confession in criminal case. 12 L Ed 2d 1340.

* By the Publisher's Editorial Staff.

POINTS OF COUNSEL

Michael J. Obus, Matthew Muraskin and *Barbara M. Rosen* for appellant. I. Appellant's statement should have been suppressed since it was the product of unlawful interrogation. (*People v Hobson*, 39 NY2d 479; *People v Arthur*, 22 NY2d 325; *People v Vella*, 21 NY2d 249; *People v Donovan*, 13 NY2d 148; *People v Kaye*, 25 NY2d 139; *People v McKie*, 25 NY2d 19; *People v Paulin*, 25 NY2d 445; *People v Jackson*, 41 NY2d 146; *People v Stroud*, 63 AD2d 721; *People v Stewart*, 41 NY2d 65.) II. It was error to inform the jury that the charge

regarding appellant's decision not to testify had been requested by appellant. *(People v McLucas,* 15 NY2d 167; *People v Britt,* 43 NY2d 111.) III. If appellant's robbery conviction is reversed, his plea of guilty to burglary in the third degree should be vacated. *(People v Clark,* 45 NY2d 432; *People v Selikoff,* 35 NY2d 227; *People v Lowrance,* 41 NY2d 303; *People v Jones,* 57 AD2d 905; *People v Campana,* 40 AD2d 833, 33 NY2d 538.)

Denis Dillon, District Attorney (Judith K. Sternberg and *William C. Donnino* of counsel), for respondent. I. Defendant's statement was spontaneous; it was not the product of improper police interrogation; therefore, it was correctly admitted into evidence at his trial for robbery. *(People v Hetherington,* 27 NY2d 242; *People v Taylor,* 27 NY2d 327; *People v Carl,* 46 NY2d 806; *People v Maerling,* 46 NY2d 289; *People v Clark,* 41 NY2d 612; *Massaiah v United States,* 377 US 201; *United States v Garcia,* 377 F2d 321; *People v Ramos,* 40 NY2d 610; *People v Townes,* 41 NY2d 97.) II. The court's charge, to which no exception was taken, did not constitute reversible error. *(People v Turner,* 48 AD2d 674; *People v Carlton,* 48 AD2d 775; *People v Patterson,* 39 NY2d 288; *People v McLucas,* 15 NY2d 167; *People v Britt,* 43 NY2d 111.) III. If appellant's conviction of robbery is vacated, his plea of guilty to burglary in the third degree must be vacated. *(People v Clark,* 45 NY2d 432.)

OPINION OF THE COURT

Chief Judge Cooke.

[1] We hold today that once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel. We may not blithely override the importance of the attorney's entry by permitting interrogation of an accused with respect to matters which some may perceive to be unrelated.

Defendant was convicted, after jury trial, of robbery in the first degree and, upon plea of guilty, of burglary in the third degree. The evidence at trial in part consisted of eyewitness testimony and certain statements made by defendant while in custody and after his attorney had instructed police to cease further questioning. Defendant unsuccessfully sought to suppress this proof and the judgments of conviction were affirmed

by the Appellate Division, without opinion. There should be a reversal and a new trial on the robbery indictment.

Defendant was arrested in his home on December 16, 1975 at about 10:15 A.M. as a suspect in a liquor store robbery committed by two youths on February 7, 1975. Defendant was handcuffed, placed in a patrol car and taken to the robbery squad in Mineola. At the time of arrest, and again at police headquarters, *Miranda* warnings were administered. Defendant informed the police that he had an attorney but that he was willing to speak in the absence of the attorney. After a two-hour period of interrogation in which defendant denied complicity in the crime, the police received a communication from his attorney instructing them to cease further questioning.

Thereafter, the police asked no further questions about the robbery but, under a purported waiver of defendant's rights, continued to question concerning unrelated activities in which he had not participated. These queries continued for approximately four hours after the communication from his attorney. During this entire period, defendant was manacled. After inquiries ceased, the police completed the paper work necessary to process defendant and no further information was sought. Defendant then uttered an inculpatory statement which was overheard by one of the detectives who had been questioning him. His motion to suppress the statement was denied on the ground that the assertion was spontaneously volunteered, and this appeal is based on that ruling.[1]

The genesis of defendant's utterance must be determined to be either as one arising out of sheer spontaneity or as having been induced by illegal police questioning. The threshold issue is whether once a defendant is represented on pending matters, the police may question the defendant on items unrelated to the subject of that representation after the defendant, in the absence of counsel, has waived his rights.

This court has jealously guarded the individual's privilege against self incrimination and right to counsel, demanding that these fundamental rights be accorded the highest degree of respect by those representing the State. Indeed, it has been announced in broad language that "[o]nce an attorney enters

1. Defendant does not challenge on this appeal the refusal to suppress identification testimony or the statements made by defendant prior to the call to the police by defendant's attorney.

the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel * * * There is no requirement that the attorney or the defendant request the police to respect this right of the defendant" (*People v Arthur*, 22 NY2d 325, 329; see, also, *People v Settles*, 46 NY2d 154; *People v Hobson*, 39 NY2d 479).

The People maintain nonetheless that a waiver in the presence of counsel is necessary only when the defendant is subjected to interrogation concerning the charge on which he is represented. Thus, it is urged that the four-hour interrogation after the attorney had entered the proceeding was proper because it dealt only with unrelated matters. The People's position, however, is untenable, it being at odds with the thrust of recent decisions concerning the scope of the State constitutional right to counsel (NY Const, art I, § 6).

It is true that previous decisions of this court, rendered in an era when the *Arthur* rule was in doubt, excepted from its scope questioning about a charge unrelated to the one on which defendant was represented (see *People v Taylor*, 27 NY2d 327; *People v Hetherington*, 27 NY2d 242; but see *People v Vella*, 21 NY2d 249). And, when the *Arthur* rule was revitalized in *People v Hobson* (39 NY2d 479, 483, *supra*), the exception for unrelated charges was again articulated, although there the court had no need to apply the rule. Since *Hobson*, however, it has been difficult to define the precise reach of the limitation concerning unrelated charges. Perhaps this is a result of the obvious difficulty encountered in drawing the subtle distinctions necessitated by the interaction of the *Hobson* and *Taylor* rules.

Specifically, in *People v Ramos* (40 NY2d 610), where the defendant, who was represented by an attorney on a drug charge, had been advised not to make any statements at the time of his arrest on an unrelated charge, the advice of the attorney was deemed sufficient to trigger the *Arthur* rule, and the statements concerning the unrelated charge were suppressed. The ruling was based not on "the mere fortuity that [defendant] was represented by counsel on an unrelated charge, but rather * * * on the attorney's affirmative and direct action relative to the interrogation which was about to be commenced" (*Ramos*, 40 NY2d, at p 617). The broad *Taylor* rule was refined and limited to include the situation "where

counsel had not entered the proceeding and where no request for counsel had been made, even though the same defendant might, by mere happenstance, be represented by counsel in a totally unrelated proceeding" *(id.)*.

Last term in *People v Carl* (46 NY2d 806, 807), it was held to be a "technicality of little significance" that defendant was questioned concerning a crime different than the one for which he was in custody. Prior to the interrogation, counsel had instructed the Sheriff not to speak with defendant in the absence of counsel. Notwithstanding that separate crimes were involved, the court determined that the charges were sufficiently related to preclude interrogation in the absence of counsel because the two incidents occurred within approximately one week, both involved burglaries or attempted burglaries at the same location and both were charged in the same indictment.

The *Taylor* limitation was further refined in *People v Ermo* (47 NY2d 863), where defendant was questioned about both an assault and a homicide, committed seven months apart, in the absence of the attorney who represented him on the assault charge. Although conceding that the police would have been entitled to question defendant on the homicide alone, the court nonetheless held statements concerning the homicide to be inadmissible because "the police exploited concededly impermissible questioning as to the assault for the purpose and with the effect of advancing their interrogation on the homicide charge" *(id.,* at p 865). By suppressing these statements, however, the question no longer was whether the defendant was represented on the charge about which he was questioned. Rather, the focus of inquiry was the circumstances of the interrogation and whether its subject included a charge on which defendant had an attorney (see 47 NY2d, at p 868, GABRIELLI, J., dissenting).

Thus following *Hobson* it has been urged in several cases and under a variety of circumstances that the exception concerning unrelated charges was applicable. In each instance, however, it has been found that the exception could not be applied or expanded consistent with the *Hobson* rationale. It is evident that in these cases, the *Taylor* rule was considerably narrowed (but cf. *People v Coleman*, 43 NY2d 222; *People v Clark*, 41 NY2d 612). The common thread running through these holdings is the simple fact that defendant was represented by an attorney at the time of the

interrogation. We today recognize that the *Taylor* rule is inconsistent with the principles enunciated in *Hobson* and declare that once a defendant is represented by an attorney, the police may not elicit from him any statements, except those necessary for processing or his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel.

Our acknowledgment of an accused's right to the presence of counsel, even when the interrogation concerns unrelated matters, represents no great quantitative change in the protection we have extended to the individual as a shield against the awesome and sometimes coercive force of the State. An attorney is charged with protecting the rights of his client and it would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge. It cannot be assumed that an attorney would abandon his client merely because the police represent that they seek to question on a matter unrelated to the charge on which the attorney has been retained or assigned. Finally, it is the role of defendant's attorney, not the State, to determine whether a particular matter will or will not touch upon the extant charge. Once a defendant has an attorney as advocate of his rights, the attorney's function cannot be negated by the simple expedient of questioning in his absence.

The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming. That the rule diminishes the likelihood of a waiver or self incriminating statements is immaterial to our system of justice (see *People v Settles*, 46 NY2d 154, 164, *supra*; *People v Donovan*, 13 NY2d 148, 152). Although the State has a significant interest in investigating and prosecuting criminal conduct, that interest cannot override the fundamental right to an attorney guaranteed by our State Constitution.[2] Available are means other than subjecting a person represented by an attorney to interrogation in the absence of counsel.

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2. Contrary to the suggestion of the dissent, this holding creates no undue impediment to the investigation of criminal conduct unrelated to the pending charge. An accused represented by counsel may still be questioned about such matters; we hold simply that information obtained through that questioning in the absence of counsel may not be used against him. Thus, the police may continue to obtain information from a defendant who is a mere witness to unrelated events.

Having determined that the police interrogation was improper, we turn then to the question whether the inculpatory statement was admissible as a "spontaneously volunteered statement" (*People v Hobson*, 39 NY2d, at p 483, *supra*). To fit within this narrow exception, the "spontaneity has to be genuine and not the result of inducement, provocation, encouragement or acquiescence, no matter how subtly employed" (*People v Maerling*, 46 NY2d 289, 302-303). Given the unique circumstances here, there can be no conclusion other than that defendant's statement did not fall within the exception. Defendant, a youth of limited education, was vigorously questioned by two experienced detectives. Although no physical force was employed, the interrogation covered an extensive period—approximately six hours—and during this entire time defendant was manacled to furniture. A coercive atmosphere had been affirmatively created by the continuous interrogation and the significant restriction on defendant's freedom of movement. The statement was made in the interrogation room when defendant was still handcuffed and while the police processed the paper work in his presence. It cannot be doubted that the psychologically coercive influence of the police tactics had its effect on defendant and induced the statement apparently directed to himself (compare *People v McKie*, 25 NY2d 19, and *People v Kaye*, 25 NY2d 139, with *People v Garofolo*, 46 NY2d 592, and *People v Maerling*, 46 NY2d 289, *supra*).

Mere custody exerts some coercive influence on a suspect, but generally, such influence alone will not form the predicate for finding a statement nonspontaneous as a matter of law. Nor is a statement to be precluded simply because it followed a period of questioning conducted at some prior time. Here there is much more; defendant's will was overborne by a course of conduct destructive of dignity with no respite save for a mere half hour.

[1, 2] The introduction of defendant's inculpatory statement was error, which cannot be termed "harmless beyond a reasonable doubt" (*People v Crimmins*, 36 NY2d 230, 237), and requires a new trial.[3] Since defendant's plea of guilty to

3. [2] Defendant raises as another point on this appeal that the trial court erred when it informed the jury that the defendant had requested the charge that no inferences were to be drawn from the defendant's failure to testify. Defendant failed to object to the charge and thereby failed to preserve this issue for review. In any event, in light of the disposition of this case, it is unnecessary to rule on this issue.

(a cont'd)

burglary in satisfaction of another indictment was entered upon an agreement that the sentence imposed would run concurrently with the sentence imposed on the robbery conviction, the plea should be vacated *(People v Clark,* 45 NY2d 432).

The order of the Appellate Division should be reversed, judgments and plea of guilty vacated, statement suppressed and case remitted to Nassau County Court for a new trial on the robbery indictment and further proceedings on the burglary indictment in accordance with this opinion.

JASEN, J. (dissenting). I simply cannot accept the theory, espoused by the majority of this court, that a defendant represented by counsel in a pending criminal proceeding may not be questioned by law enforcement officers even about concededly unrelated matters in the absence of that counsel. To reach such a result, the majority not only misperceives the right of an accused to be represented by counsel, but, also, blindly elevates that right above the compelling interest of the State to investigate and prosecute criminal conduct.

It has long been recognized in this State that law enforcement officers may question a defendant about matters which are unrelated to the criminal proceeding in which the defendant is represented by counsel. *(People v Ermo,* 47 NY2d 863, 865; *People v Coleman,* 43 NY2d 222, 226-227; *People v Clark,* 41 NY2d 612, 615, cert den 434 US 964; *People v Hobson,* 39 NY2d 479, 483; *People v Taylor,* 27 NY2d 327, 331-332; *People v Hetherington,* 27 NY2d 242, 245.) Contrary to the majority's assertion, this rational rule of law is hardly inconsistent with the principle that "[o]nce an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant's right to counsel" *(People v Arthur,* 22 NY2d 325, 329; *People v Hobson,* 39 NY2d 479, 483, *supra).* That no inconsistencies were ever perceived or, indeed, anticipated by this court from the application of these two distinct concepts is apparent from the plain language of *Hobson* itself, where this court, in unanimously reaffirming the rule of the *Arthur* case *(supra)* observed: "[T]he fact that a defendant is represented by counsel in a proceeding unrelated

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Because a new trial is warranted, however, we note that it is unnecessary and improper to qualify the charge with words indicating that it is given at defendant's request (see *People v McLucas,* 15 NY2d 167).

to the charges under investigation is not sufficient to invoke the *[Arthur]* rule (see *People v Hetherington*, 27 NY2d 242, 245, *supra; People v Taylor*, 27 NY2d 327, 331-332)." *(People v Hobson*, 39 NY2d, at p 483, *supra.)* Thus, the majority's assertion that these rules of law are inconsistent is belied by the unequivocal language of the very case from which they attempt to draw support.

Nor does the rule of law which authorizes the questioning of a defendant as to matters unrelated to the proceeding in which he is represented by an attorney impinge upon the right of an accused to be assisted by counsel. With respect to these unrelated matters, there has yet to be any formal commencement of a criminal proceeding against the defendant to which the right to counsel would attach. *(People v Simons*, 22 NY2d 533, 539; *People v Stanley*, 15 NY2d 30, 32-33.) Further, the defendant, after being informed of his constitutional rights, could simply refuse to respond to inquiries posed to him by the law enforcement officers or request that an attorney be provided for him during questioning. A defendant is under no compulsion to answer any questions whatsoever, even as to unrelated matters. Thus, as in this case, where a defendant voluntarily chooses to provide the police with information concerning criminal activitiy which differs from the criminal conduct which gave rise to his arrest and there is absolutely no indication of exploitation of defendant by law enforcement officers, a defendant's right to counsel is simply not jeopardized.

In my opinion, implementation of the majority's holding—purportedly predicated on right to counsel principles—will serve only to impede effective law enforcement by depriving police officers of valuable sources of information. For example, pursuant to the majority's position, law enforcement officers will be precluded from questioning a defendant charged with driving a motor vehicle while intoxicated about a brutal murder unless they first contact the defendant's attorney representing him on the driving while intoxicated charge and secure his presence at the questioning. This is so even if the defendant was an innocent bystander who witnessed the murder and voluntarily agreed to co-operate with the police. Surely, the right to counsel was never intended to prevent a defendant from voluntarily co-operating with police concerning matters unrelated to the crime for which he is

charged. To hold to the contrary defies both constitutional principles and common sense.

Even accepting, *arguendo*, the view of the majority that defendant was improperly questioned as to unrelated crimes, there exists an additional, and, indeed, fatal flaw in the rationale adopted by the majority. I had thought it was a well-established principle of law in this State that a spontaneous statement made to police by a defendant who had been advised of his constitutional rights is not rendered inadmissible solely because the defendant was in custody and represented by counsel who was not present when the statement was volunteered. (*People v Clark*, 41 NY2d 612, 615, *supra*; *People v Hobson*, 39 NY2d 479, 483, *supra*; *People v Kaye*, 25 NY2d 139, 143-144; *Matter of Carlton W.*, 63 AD2d 830; *People v Howard*, 62 AD2d 179, 181; *People v Talamo*, 55 AD2d 506, 507-508.)

Yet, today, the majority holds that the concededly volunteered statement of this convicted defendant was not spontaneous, and, therefore, must be suppressed. Such conclusion is reached by the majority only after reviewing the facts in the record and drawing inferences therefrom. This, we are unable to do. (NY Const, art VI, § 3.)

The issue of whether an inculpatory statement is "spontaneous" and, thus, admissible into evidence despite law enforcement officers' failure to honor a defendant's right to counsel is essentially one of fact. (*People v Maerling*, 46 NY2d 289, 301.) Here, County Court, after considering all the facts and circumstances present, determined that defendant's inculpatory statement was spontaneous. This finding of spontaneity, being affirmed by the Appellate Division, is beyond our review if there exists any factual support in the record for such determination. (*Id.*; cf. *People v Leonti*, 18 NY2d 384, 390.) Stated differently, the sole question before this court is whether, under any view of the facts, it could be concluded that defendant's statement was not solicited by law enforcement officers.

The testimony adduced at the suppression hearing reveals that defendant was not physically abused or threatened by the police officers. Defendant was questioned only as to matters concerning unrelated crimes after 1:00 P.M. and, further, all questioning of defendant occurred during the daytime and ceased by 4:45 P.M. It was not until a half hour later when defendant, while gazing out the window, uttered the inculpa-

tory statement. The police officers were not conversing with defendant at this time, as they were completing their paper work with respect to defendant's arrest.

Given these circumstances, I find more than ample evidence to support County Court's determination that defendant's statement was spontaneous. In my opinion, the majority, in holding to the contrary, has transgressed our limited scope of review in these matters and has, in actuality, usurped the authority of County Court and the Appellate Division to pass upon issues of fact. Where reasonable minds may differ as to the inferences to be drawn from a certain set of circumstances, this court "may not interfere with the affirmed findings of that court possessing authority to resolve the issues of fact." *(People v Wharton,* 46 NY2d 924, 925.)

Further, as we noted in *People v Kaye* (25 NY2d 139, 145, *supra),* "[t]ruly voluntary confessions constitute a highly trustworthy type of evidence * * * No court has yet held that a police officer must take affirmative steps, by gag or otherwise, to prevent a talkative person in custody from making an incriminatory statement within his hearing. * * * To require a police officer to prevent a prisoner from volunteering a statement, or to prevent the officer from divulging statements spontaneously made to him would stretch the comprehension of the average citizen to the breaking point. Our decisions must appear to be rational, fair as well as practical, if the courts are to retain the respect of the people. The admonition of Justice CARDOZO is particularly appropriate under these circumstances—'[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament.' *(Snyder v. Massachusetts,* 291 U. S. 97, 122.)"

Accordingly, I would affirm the order of the Appellate Division.

Judges JONES, WACHTLER, FUCHSBERG and MEYER concur with Chief Judge COOKE; Judge JASEN dissents and votes to affirm in a separate opinion in which Judge GABRIELLI concurs.

Order reversed, judgments and plea of guilty vacated, statement suppressed and case remitted to Nassau County Court for further proceedings on the indictments in accordance with the opinion herein.

APPENDIX "E" - People v. Bartolomeo, 53 N.Y.2d 225 (1981) - (attached)

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v PETER BARTOLOMEO, Appellant.

Argued April 27, 1981; decided June 16, 1981

SUMMARY

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 21, 1980, as amended by an order entered August 5, 1980, which affirmed a judgment of the Supreme Court (THOMAS M. STARK, J.), rendered in Suffolk County upon a verdict convicting defendant of murder in the second degree.

On May 27, 1978, defendant was arrested by the Suffolk County Police Department and arraigned on a charge of arson. At that arraignment defendant was represented by counsel. Thereafter, on June 5, 1978, defendant was apprehended by officers of the same law enforcement agency and taken to its homicide headquarters in connection with an unrelated homicide. At no time did defendant or his father, who was with him when he was taken into custody, refer to the fact that he had an attorney on the arson charge. At the police station two homicide squad detectives, both of whom knew of defendant's arson arrest a few days earlier, but neither of whom knew that he was represented by counsel in that matter, advised defendant of his constitutional preinterrogation rights. Defendant stated that he did not want an attorney and would answer questions without one. Defendant was then informed that he was under arrest for the homicide. Thereafter, the officers elicited the incriminating statements from defendant that he later sought to suppress on the ground that his constitutional right to counsel had been violated. Following a hearing, suppression was denied. The Appellate Division affirmed, without opinion.

The Court of Appeals reversed, vacated the judgment of conviction, suppressed the statements made to the police officers and remitted the case to the Supreme Court for further proceedings on the indictment, holding, in an opinion by Judge JONES, that a suspect cannot waive counsel

in the absence of counsel where the interrogating officers know he had been arrested only days before on an unrelated charge and, although they do not have actual knowledge of his representation on said charge, he did, in fact, have counsel thereon; that evidence seized pursuant to a search warrant issued on the basis of a sworn statement by defendant's accomplice as to events which provide probable cause for the issuance of the warrant need not be suppressed; that the police officer's affidavit, submitted to obtain the search warrant, characterizing the information received from the accomplice as "reliable" does not invalidate the warrant by reason of the detective's subsequent expression of doubt as to the accomplice's truthfulness on matters not addressed in the warrant application, and that the rule that a defendant may not be convicted on the testimony of an accomplice unsupported by corroborative evidence does not apply to the establishment of probable cause for the issuance of a search warrant.

People v Bartolomeo, 77 AD2d 819, reversed.

HEADNOTES

Crimes — Right to Counsel — Representation on Unrelated Matter

1. Statements obtained in consequence of a police interrogation of a suspect must be suppressed if, in fact, the suspect is represented by an attorney on an unrelated charge, for which he had been arrested by the same law enforcement agency nine days previously, and such prior arrest is known to the interrogating officer, even though the fact of the suspect's legal representation on the matter is unknown to the interrogating officer; such actual knowledge of the recent arrest charges the officers with constructive notice of counsel, if an attorney was obtained, and forecloses the officers either from questioning defendant or accepting his waiver of counsel's assistance unless his attorney is present.

Crimes — Search Warrant — Probable Cause

2. The two-prong test set out in *Aguilar v Texas* (378 US 108) which must be met when a warrant is sought on the basis of a law enforcement officer's affidavit reciting information relayed to him by another person, i.e., that the source from which a police officer obtained his knowledge was reliable and that the information obtained from that source was itself entitled to be credited, is inapplicable when there is presented to the issuing Magistrate a sworn statement of the factual information sufficient to establish probable cause for the warrant's issuance made by one, such as an accomplice, to whom the data is firsthand information by reason of his personal observation and participation in the events described and, accordingly, evidence seized pursuant to a warrant issued on the basis of such information need not be suppressed.

Crimes — Search Warrant — Probable Cause

3. If a defendant establishes that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in a search warrant affidavit and that such false statement is necessary to the finding of probable cause, the search warrant must be voided. However, a warrant is not invalid where the police officer affiant expressed doubt as to defendant's accomplice's truthfulness concerning matters which had no relation to the abbreviated information obtained from the accomplice that was set out in the detective's affidavit, which described him as "reliable"; additionally, even if the detective's affidavit were to be disregarded in its entirety, the detailed, sworn statement of the accomplice, based on his knowledge of and participation in the event charged and submitted with the officer's affidavit, is alone sufficient to provide probable cause for the issuance of the warrant.

Crimes — Search Warrant — Probable Cause

4. The rule that a defendant may not be convicted on the testimony of an accomplice unsupported by corroborative evidence (CPL 60.22) does not apply to the establishment of probable cause for the issuance of a search warrant; the statute prescribing the rule is expressly applicable only to convictions and, moreover, the significant difference in kind between the determination of guilt beyond a reasonable doubt as the predicate for the imposition of criminal sanctions, on the one hand, and the demonstration of probable cause sufficient to satisfy the constitutional requirements for search and seizure as the warrant for police investigation, on the other, justifies a differentiation.

POINTS OF COUNSEL

Richard A. Greenberg for appellant. I. Appellant's uncounseled station house interrogation by Detective Rafferty nine days after appellant's right to counsel h[illegible] attached on pending felony charges in the same county violated his right to counsel under the authority of *People v Rogers* (48 NY2d 167) and the Sixth and Fourteenth Amendments to the United States Constitution. (*People v Wander*, 47 NY2d 724; *People v Garofolo*, 46 NY2d 592; *People v Maerling*, 46 NY2d 289; *People v Pinzon*, 44 NY2d 458; *People v Macedonio*, 42 NY2d 944; *People v Hobson*, 39 NY2d 479; *People v Vella*, 21 NY2d 249; *People v Miller*, 76 AD2d 576; *People v Settles*, 46 NY2d 154; *People v Ramos*, 40 NY2d 610.) II. The prosecutor's knowing and uncorrected use at trial of his witness' perjured testimony concerning the existence of a promise on a pending charge violated due process and appellant's right to a fair trial guaranteed by the New York and United States Constitutions. (*Du Bose v LeFevre*, 619 F2d 973; *People v Savrides*, 1 NY2d 554; *Giglio v United States*, 405 US 150; *Napue v Illinois*, 360 US 264; *Taylor v Lombard*, 606 F2d 371.)

III. The prosecutor's introduction of evidence at trial, over objection, that others had attempted to suppress evidence or otherwise obstruct justice, without any showing that appellant knew of and authorized such conduct, deprived appellant of his due process right to a fair trial in violation of the New York and United States Constitutions. *(People v Shilitano*, 218 NY 161; *People v Pignataro*, 263 NY 229; *People v Plummer*, 36 NY2d 161; *People v Buzzi*, 238 NY 390.) IV. Appellant's right of confrontation guaranteed by New York's Civil Rights Law and the Sixth and Fourteenth Amendments to the United States Constitution, as well as his due process right to a fair trial guaranteed by the New York Constitution and the Fourteenth Amendment, were violated when the prosecution's principal witness was permitted to invoke repeatedly his Fifth Amendment privilege on cross-examination without his direct testimony being stricken upon appellant's timely motion. *(People v Schneider*, 44 AD2d 845, 36 NY2d 708; *Pointer v Texas*, 380 US 400; *United States v Cardillo*, 316 F2d 606, 375 US 822; *People v Kelly*, 48 AD2d 802; *People v Baker*, 39 NY2d 923, 429 US 868; *People v Daniels*, 37 NY2d 624.) V. The probable cause and due process standards of the New York Constitution and the Fourth and Fourteenth Amendments to the United States Constitution were violated by the issuance of a search warrant upon the hearsay confession of an alleged accomplice whose reliability (a) was not corroborated by any facts and (b) was known to be questionable by the submitting officer who nonetheless falsely swore otherwise in his own accompanying affidavit. *(People v Elwell*, 50 NY2d 231; *People v Hanlon*, 36 NY2d 549; *Aguilar v Texas*, 378 US 108; *Spinelli v United States*, 393 US 410; *People v Wheatman*, 29 NY2d 337; *People v Sawicki*, 60 AD2d 739; *People v Everett*, 60 AD2d 693; *People v Wolzer*, 41 AD2d 679; *People v Johns*, 41 AD2d 342; *United States v Harris*, 403 US 573.)

Patrick Henry, District Attorney (Vincent A. Malito of counsel), for respondent. I. Appellant's admissions to the police were not obtained in violation of his right to counsel. *(People v Rogers*, 48 NY2d 167; *People v Coleman*, 43 NY2d 222; *People v Garofolo*, 46 NY2d 592; *People v*

Marrero, 51 NY2d 56; *People v Lynes*, 49 NY2d 286; *People v Miller*, 76 AD2d 576; *People v Samuels*, 49 NY2d 218; *People v Benitez*, 76 AD2d 196; *People v Brathwaite*, 76 AD2d 931; *People v Bacote*, 76 AD2d 866; *People v Whitaker*, 75 AD2d 111; *People v Bolden*, 75 AD2d 622; *People v Couch*, 74 AD2d 582.) II. The witness Giordano testified truthfully at all times, and the prosecutor did not permit perjured testimony. III. Appellant was not deprived of a fair trial by the evidence of threats and intimidation. IV. Caprisecca's invocation of his Fifth Amendment privilege on cross-examination and the court's refusal to strike his direct testimony were appropriate. (*United States v Cardillo*, 316 F2d 606, 375 US 822; *Dunbar v Harris*, 612 F2d 690; *People v Baker*, 48 AD2d 662; *People v Brown*, 40 NY2d 381; *People v Schneider*, 44 AD2d 845, 36 NY2d 708; *People v Jackson*, 94 Misc 2d 33, 102 Misc 2d 443.) V. The application for the search warrant authorizing the seizure of defendant's Volkswagen was sufficient. (*People v Everett*, 60 AD2d 693; *People v Sawicki*, 60 AD2d 739; *People v Johns*, 41 AD2d 342.)

OPINION OF THE COURT

JONES, J.

[1, 2] Where to the knowledge of the interrogating officer a suspect being questioned had been arrested by the same law enforcement agency nine days previously on an unrelated charge, statements obtained in consequence of the interrogation must be suppressed if in fact the suspect is represented by an attorney with respect to the unrelated charge even though the fact of such representation is unknown to the officer. In such circumstances defendant cannot effectively waive his right to counsel unless the attorney is present.[1] There need not be suppression, however, of evidence seized pursuant to a search warrant issued on the basis of a sworn statement by one who has personal knowledge of, and participated in, events which provide probable cause for the issuance of the warrant.

1. We intimate no views as to what might be the consequence in another case in which the defendant's prior arrest is remote in time or place or is made by officers of another law enforcement agency (cf. *People v Kazmarick*, 52 NY2d 322, 328, 329).

[1] On this appeal from an order affirming a judgment convicting defendant of the crime of murder in the second degree after a jury trial defendant contends that numerous errors before and during trial, require reversal of his conviction. Because error was committed in the denial of his pretrial motion to suppress incriminating statements obtained from him while in custody in the absence of, and in violation of his right to, counsel, we reverse and remit for further proceedings without consideration of other alleged trial errors.

Findings of fact made by the Judge who presided at the suppression hearing, which have been affirmed by the Appellate Division, establish the following sequence of events. On May 27, 1978 defendant was arrested by the Suffolk County Police Department and arraigned on a charge of arson. At that arraignment defendant was represented by counsel, attorney Joseph Stabile.

Thereafter, on June 5, 1978, defendant was apprehended by officers of the same law enforcement agency and taken to its homicide headquarters in connection with an investigation then being conducted of the death of one John McLaughlin which had occurred the preceding April. At no time did defendant or his father, who was with him when he was taken into custody, refer to the fact that he had an attorney on the arson charge.

At the police station two homicide squad detectives, Rafferty and Donohue, both of whom knew of defendant's arson arrest a few days earlier but neither of whom knew that he was represented by counsel in that matter, advised defendant of his constitutional preinterrogation rights. In response to questions from the detectives and without mention of the fact that he already had an attorney on the arson charge, defendant stated that he did not want an attorney and would answer the detectives' questions without one. Detective Rafferty then informed him that he was under arrest for the McLaughlin homicide and, by relating details of a statement implicating defendant given by an accomplice Caprisecca (who was already in custody in connection with the crime), extracted from defendant the incriminating statements sought to be suppressed. Approximately

three-quarters of an hour after defendant's arrival at the police station, an attorney, who had been consulted by attorney Stabile concerning the arson charge, called the station and informed Detective Rafferty that he was representing defendant and wanted all questioning to cease. Thereupon the interrogation promptly came to an end.

In denying suppression of Detective Rafferty's and Detective Donohue's testimony as to the statements made to them by defendant while he was in custody on June 5, the Judge presiding at the suppression hearing concluded that there had been no violation of the defendants constitutional right of access to counsel at the time he waived his right to counsel, no attorney having entered the homicide proceeding at that time. "The defendant's happenstance representation by an attorney in the unrelated arson proceedings, such fact being unknown to the homicide squad detectives, is insufficient to invoke the Hobson rule."[2] The Appellate Division affirmed, without opinion.

We reach a different conclusion and accordingly reverse the judgment of conviction. Knowledge that one in custody is represented by counsel, albeit on a separate, unrelated charge, precludes interrogation in the absence of counsel and renders ineffective any purported waiver of the assistance of counsel when such waiver occurs out of the presence of the attorney (*People v Miller*, 54 NY2d 616; *People v Rogers*, 48 NY2d 167). The same consequence flows from knowledge, such as that possessed by Detectives Rafferty and Donohue here, that the defendant has been arrested only seven days earlier by members of the same police department on an arson charge, if in fact the defendant has counsel on the earlier charge. This follows naturally on the awareness on the part of law enforcement personnel of judicial concern for, and protection of, a criminal defendant's right to the aid of counsel at every critical stage of proceedings against him. Hence, the interrogating detectives here, with actual knowledge of the

2. The rule referred to was stated in *People v Hobson* (39 NY2d 479) at page 481: "Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer."

outstanding arson charge against defendant, were under an obligation to inquire whether defendant was represented by an attorney on that charge. Having failed to make such inquiry, the officers were chargeable with what such an inquiry would have disclosed—namely, that defendant did have an attorney acting on his behalf. With such knowledge they were foreclosed either from questioning defendant or from accepting his waiver of counsel's assistance unless his attorney was then present. It was therefore error to deny suppression of testimony as to the statements made by defendant at the Suffolk County police station on June 5, 1978. For this reason, defendant's conviction must be vacated.

[2] We reject however defendant's contention that it was error to deny suppression of his 1966 Volkswagen which had been seized pursuant to a search warrant issued by Suffolk County Court. (At the trial photographs of the vehicle taken by the police after its seizure were received in evidence, as was testimony by a resident of the neighborhood in which the homicide occurred, who had been shown the Volkswagen by the police, that it looked like a vehicle that he had seen there on the night of the homicide.)[1]

The warrant which directed seizure of the vehicle, reciting that probable cause had been shown that the Volkswagen constituted evidence of a crime and tended to show that a particular person had committed a crime, was issued on presentation to a Suffolk County Court Judge of a sworn, written statement given by the accomplice Caprisecca which accompanied an affidavit by Detective Rafferty. The first of these documents contained a detailed eyewitness recital of events surrounding the McLaughlin homicide, including a description of Caprisecca's and defendant's midnight journey in defendant's Volkswagen to the place of residence of the victim armed with a gun for the purpose of getting money, of their entry into the house after ringing the bell with no response, of defendant's shooting the victim who

1. Nothing found in the vehicle was introduced in evidence. Following the hearing on the motion to suppress, the court granted suppression of a .22 caliber cartridge found under the floor mat as not having been described in the search warrant.

was surprised on the premises, of their hurried departure in the Volkswagen, and of the subsequent disposal of the weapon by throwing it in a bay. Detective Rafferty's affidavit stated that he had received information through a conversation with Caprisecca that (1) the described Volkswagen had been used during the commission of the identified April homicide and (2) that Caprisecca and defendant had committed the homicide, which information he characterized as reliable. In denying the request for suppression of defendant's vehicle which had been seized pursuant to the warrant, the Judge before whom the suppression hearing was held found that reasonable and sufficient cause for the warrant had been demonstrated to the issuing Judge.

In that conclusion we find no error, an ample showing of probable cause (the *sine qua non* for issuance of a search warrant) having been made in the two documents—and, in particular, in the sworn statement by the accomplice Caprisecca—on which the request for the warrant was predicated.

Defendant's insistence that the sufficiency of the documents submitted to the issuing Judge must be measured by the two-pronged test set out in *Aguilar v Texas* (378 US 108) is misplaced. The requirements of *Aguilar* must be met when a warrant is sought on the basis of an affidavit made by a law enforcement officer reciting information relayed to him by another person—often, as in *Aguilar*, an unidentified informant. In such a case, where the affidavit "'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein'" (378 US, p 113), it must be shown both that the source from which the officer obtained his knowledge was reliable and that the information obtained from that source was itself entitled to be credited. Subsequent application of the *Aguilar* requirements, by both the Supreme Court of the United States and the courts of this State, have been in cases in which the material necessary to provide reasonable cause for the issuance of a warrant has been included in the affidavit of the officer applying for the warrant and has consisted of communications to the officer by a third person, unsupported by a sworn statement or affirmation

of such third person (e.g., *United States v Harris*, 403 US 573; *Spinelli v United States*, 393 US 410; *United States v Ventresca*, 380 US 102; *People v Wirchansky*, 41 NY2d 130; *People v Hanlon*, 36 NY2d 549). In such a context there is need for disclosure to the issuing Magistrate of sufficient factual data to enable him to determine whether he may properly rely on the hearsay source of the officer's information as well as whether he may credit the information itself.

The *Aguilar* standard is inapplicable, however, when there is presented to the issuing Magistrate a sworn statement of the factual information sufficient to establish probable cause for the warrant's issuance, made by one—like Caprisecca in this case—as to whom the data is first-hand information by reason of his personal observations and participation in the events described. In such an instance there is no lack of personal knowledge on the part of the affiant—the factor significant in the *Aguilar*-type cases; rather the Magistrate has before him "facts or circumstances presented to him under oath or affirmation" (*Nathanson v United States*, 290 US 41, 47). A sufficient predicate for a finding of probable cause has been tendered; if the Magistrate entertains doubt as to the veracity of the maker of the sworn statement he may require that the affiant appear before him for examination before determining whether to issue the warrant. In the present case the County Court Judge was justified in concluding on the basis of the documents laid before him, including in particular Caprisecca's detailed eyewitness narrative of the events surrounding the homicide, that there was reasonable cause for the seizure of defendant's automobile. We perceive no error of law in that result (cf. *People v Hicks*, 38 NY2d 90; see *People v Brown*, 40 NY2d 183).

[3] Defendant's attempt to impeach the affidavit of Detective Rafferty by reason of what he contends amount to admissions by that officer that he knowingly, falsely characterized the information received from Caprisecca as "reliable" when in fact he believed it to be untrue at least in part, and thereby to bring this case within the proposition announced in *Franks v Delaware* (438 US 154) is unavail-

ing. The cited case, holding that a defendant is not in every instance foreclosed from challenging the veracity of factual statements in an officer's affidavit submitted to procure a search warrant, declared that if the defendant establishes that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and that such false statement is necessary to the finding of probable cause, the search warrant must be voided. In the present case the doubt expressed by Detective Rafferty with respect to Caprisecca's truthfulness had no relation to the abbreviated information obtained from the accomplice which was set out in the detective's affidavit and described by him as "reliable"; that doubt concerned only details contained in Caprisecca's oral conversation with the officers, none of which were included in either of the documents presented when the warrant was sought. Additionally, even if Rafferty's affidavit were to be disregarded in its entirety, the sworn statement of Caprisecca alone was sufficient to provide probable cause for the issuance of the warrant (cf. *People v Seidita*, 49 NY2d 755). The principle of the *Franks* case is inapplicable.

[4] Finally, there is no merit to defendant's argument that the rule that a defendant may not be convicted on the testimony of an accomplice unsupported by corroborative evidence (CPL 60.22) should be applied as well to the establishment of probable cause for the issuance of a search warrant. No authority is cited or has been found to support such a proposition, and nothing in principle recommends its adoption. The statute prescribing the rule is itself expressly applicable only to convictions. Moreover, the significant difference in kind between the determination of guilt beyond a reasonable doubt as the predicate for the imposition of criminal sanctions, on the one hand, and the demonstration of probable cause sufficient to satisfy the constitutional requirements for search and seizure as the warrant for police investigation, on the other, justifies a differentiation (*Brinegar v United States*, 338 US 160).

[1] Because of the error in the failure to suppress defendant's statements made to Detectives Rafferty and Donohue in the absence of counsel, the order of the Appellate Divi-

sion should be reversed, the judgment of conviction vacated, testimony as to such statements suppressed, and the case remitted for further proceedings on the indictment.

WACHTLER, J. (dissenting). A defendant who commits a crime while out on bail should not be immune from questioning by police with respect to his latest criminal acts. Such a rule would be a benefit to the repeat offender and an obstacle to law enforcement.

More specifically, the issue on this appeal is whether this court should extend the rule of *People v Rogers* (48 NY2d 167) to the facts of the present case. The majority holds that because the defendant had been represented by counsel on prior charges at the time of the interrogation the incriminating statements the defendant gave in the absence of counsel must be suppressed. The majority fails to accord significance to the fact that the police knew only that defendant had been previously arrested and did not know defendant had counsel on those earlier charges, or to the fact that defendant never indicated in any manner that he desired the aid of an attorney.

The defendant was convicted after a jury trial of felony murder in connection with a burglary in Deer Park, New York. Defendant, with an accomplice, entered the apartment of an acquaintance late at night apparently believing that no one was home. However, one of the occupants, the victim of the shooting, was alone at the time in a locked upstairs bedroom, unaware of the intruders. Upon discovering the locked door, defendant began to kick it open. When the victim appeared at the door the defendant drew his pistol and fired four to five shots, three of which struck the victim, inflicting the fatal wounds. Defendant and his companion immediately fled.

The defendant had parked his Volkswagen automobile, which was recognizable because of discolored paint and an inoperable left rear light, not far from the crime scene. When a canvass of the neighborhood disclosed that neighbors had seen the vehicle at or near the time of the crime, the police issued an alert which later resulted in a sighting of the vehicle near the defendant's apartment. The homicide detectives were notified.

While the investigation continued, defendant and the same accomplice were arrested in connection with another burglary, this one in connection with an arson. However, for reasons which do not appear in the record, defendant was released from custody on that charge. Thus, at the time defendant was brought into custody for questioning on the murder charge, it was known by the police that defendant had been arrested and released about nine days before. There is no indication in the record that the interrogating officers knew whether defendant had been arraigned on the other charges, but the findings of fact by the suppression court clearly note that none of the police officers involved in the interrogation knew whether or to what extent the defendant had been represented by counsel. Though defendant never mentioned it to the police, it appears that he did in fact have counsel on the prior charges.

Once in custody the defendant was given his *Miranda* warnings, which he stated he understood, and after which the defendant indicated he would speak to the officers without an attorney. He was then confronted with a statement which had been given by his accomplice, and this prompted the inculpatory admissions which the defendant later moved to suppress. Both the suppression court and the Appellate Division agreed that the motion should be denied. I would affirm.

In doing so I would not suggest that in situations where a defendant by a request for counsel expresses a personal inability to deal with the power of the State the right to that counsel can ever be disregarded (see *People v Marrero*, 51 NY2d 56; *People v Rogers*, 48 NY2d 167, *supra*; *People v Hobson*, 39 NY2d 479). Nor would I advocate a retrenchment from the principle that a defendant is entitled to counsel at all critical stages of a criminal prosecution (*People v Samuels*, 49 NY2d 218; *People v Settles*, 46 NY2d 154). What I do urge, however, is that neither of these principles requires the conclusion that a person who has once been arrested on a charge, however minor, upon which counsel has either entered the picture actually or constructively, must be insulated from uncounseled police interrogation (see *People v Kazmarick*, 52 NY2d 323). Such a conclusion, in addition to not being analytically required,

serves to extend prior cases beyond their intended scope, create injustice, and benefit those who are frequently arrested.

It has never been held, nor does basic fairness require, that all police interrogations will always, and in all circumstances, take place in the presence of counsel. Implicit in this is a recognition that a defendant in most instances is capable of deciding for his own reasons whether he is in need of or desires such assistance. Also implicit is that there is no need for the paternalistic view that the police should assure the assertion of a defendant's right to counsel, despite his own expressed wishes to the contrary.

To be sure, once asserted in a custodial setting the right to counsel would be of impaired value if it could be thereafter waived as a result of the often subtle persuasion against which the defendant originally sought protection (see *People v Cunningham*, 49 NY2d 203). For the same reason, the police will not be permitted to undo a request for counsel by shifting the focus of the interrogation to crimes unrelated to those on which the custody is based (see *People v Rogers*, 48 NY2d 167, *supra*). But a significantly different situation arises where the defendant has in no way, despite an expressed opportunity to do so, sought the advice of counsel in connection with a particular custodial event or on a particular charge (cf. *People v Skinner*, 52 NY2d 24). In that instance there is simply no indication of a defendant's inability to deal with the police, and if he chooses to do so there is no inherent evil in permitting the defendant to proceed in the absence of an attorney.

To be distinguished, of course, are those cases where despite a defendant's consent to an uncounseled interrogation, the right to an attorney nonetheless applies because the context has formally shifted from the investigatory to the critical accusatory state (see, e.g., *People v Settles*, 46 NY2d 154, *supra*). Because at that point a defendant is, as a matter of law, no longer capable of assessing without counsel the significance of his actions, any waiver of that right must be done in the presence of counsel or in open court. But logic does not support the assumption that because a defendant has a right to counsel in the critical

stages of one proceeding, an equally critical phase has been reached in all other unrelated investigations. For this reason, it is not material that the police in this case knew of a prior arrest of the defendant on which his right to counsel might have attached.

It also does not necessarily follow that the knowledge of the police of defendant's arrest is the equivalent of knowledge that he actually was represented by counsel. Beyond this, there certainly is no reason to assume on these facts that if there was counsel, that counsel would have become involved in a subsequent unrelated investigation, particularly in view of defendant's assertion that he wishes to proceed without the assistance of counsel (cf. *People v Arthur*, 22 NY2d 325).

Nevertheless, the majority contends that the police were bound to make affirmative inquiries into the possibility that defendant might in some manner have been represented by counsel. However, neither the Federal courts, nor this court on any previous occasion has ever suggested the constitutional necessity for what must be recognized as a new addition to the litany of *Miranda* warnings. It is already the law that a suspect must be clearly told that he may refuse to say anything in the absence of his attorney. To say that the police must do more than this carries the right to counsel to unheard of extremes.

It is the common criminal, not the one-time offender, who nearly always will manage to have at least one serious charge pending, so that the attorney in the picture can provide him with virtual immunity from questioning in subsequent investigations. I had thought it clear that although our courts are sometimes required to let the guilty go free, this is not because the Constitution serves only the miscreant, but rather because our constitutional protections must apply evenly to us all. By its analysis I believe the majority has turned this basic principle completely around by providing what is in effect a dispensation for the persistent offender.

Accordingly, for the reasons stated above, I dissent and vote to affirm the judgment of conviction.

Chief Judge COOKE and Judges FUCHSBERG and MEYER concur with Judge JONES; Judge WACHTLER dissents and votes to affirm in a separate opinion in which Judges JASEN and GABRIELLI concur.

Order reversed, judgment of conviction vacated, statements made to Detectives Rafferty and Donohue suppressed and case remitted to Supreme Court, Suffolk County, for further proceedings on the indictment.